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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 364

UNITED STATES OF AMERICA,
Petitioner,

v.

ALLIED OIL CORPORATION, P. & M. LIQUOR CORP., *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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1. STATEMENTS MADE PURSUANT TO RULE 27.

A. The opinion of the Court of Appeals (R. 128-132) is reported in 183 F. (2d) 453.

B. The judgments of the Court of Appeals were entered on July 19, 1950 (R. 132-135). The mandates of the Court of Appeals were issued to the District Court on August 28, 1950 (R. 141-142).

C. Petitioner states that the jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

2. QUESTIONS PRESENTED.

A. May the United States be substituted as party plaintiffs in these actions?

B. Were the orders granting defendants' motions to abate, and dismissing the actions appealable under Section 2105 of the revised Judicial Code (28 U. S. C. Sec. 2105) which provides:

> "There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction."

STATEMENT OF FACTS.

Petitioner's statement of facts is substantially correct with the exception that the action of the District Court in dismissing the cause was founded upon the ground that there had been a failure to comply with Rule 25(d) of the Federal Rules of Civil Procedure in that the Secretary of Commerce, the successor to Philip E. Fleming, Temporary Controls Administrator, had failed within six months after becoming Fleming's successor to show satisfactory to the court that there is a substantial need for continuing and maintaining these actions and to move to be substituted as plaintiffs. (R. 19-20)

ARGUMENT.

Two Federal statutes, each crystal clear in its language and inescapable in its application to this case, stand squarely in the path of Petitioner's argument. The first is 28 U. S. C. §2105, which precludes "reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." The second is Section 205(e) of the Emergency Price Control Act, as amended, which provides that actions such as these shall be instituted by the Price Control Administrator.

The Petitioner asks this Court to ignore the plain statutory commands and to enter a decision which can only have the effect of rewriting the statutes.

I.

Executive Orders 9841 and 9842 do not authorize the maintenance of these suits by the United States.

The Petitioner seeks to find in Executive Orders 9841 and 9842 a direction that the suits at bar be maintained in the name of the United States. What this argument overlooks is that the President of the United States is just as powerless to rewrite acts of Congress as are the courts. The President could not by executive order authorize the United States to maintain this litigation in the face of the Emergency Price Control Act which confines that responsibility to the Administrator. However, it is apparent that the Executive Orders in question were not intended to reach beyond presidential authority. By their terms they do not support Petitioner's position.

Executive Order 9841, promulgated on April 23, 1947 (12 Fed. Reg. 2645), expressly provides, in Section 302 thereof, that effective June 1, 1947 all price control functions theretofore vested in the Temporary Controls Administrator, with certain exceptions not relevant here, are "transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate • • •"

Section 402 of the above Executive Order states that the transfer of functions shall include "authority on the part of each officer to whom such functions are transferred hereunder to institute, *maintain or defend in his own name civil proceedings in any court* (including the Emergency Court of Appeals), relating to the matters transferred to him, *including any such proceedings pending on the effective date of the transfer of any such function under this order.*" (Emphasis supplied) The provisions of this paragraph are expressly made subject to Executive Order 9842.

Executive Order 9842 (12 Fed. Reg. 2646), promulgated by the President on the same date as the foregoing Executive Order 9841, states that the Attorney General is authorized and directed to conduct and maintain price control enforcement litigation "in the name of the United States or *otherwise as permitted by law.*" (Emphasis supplied)

It is clear from these Executive Orders that as of June 1, 1947, the Secretary of Commerce became the successor to the Price Control Administrator, with full authority to maintain pending litigation in his own name. The Attorney General is authorized to represent the Secretary of Commerce in such litigation. The litigation conducted by the Attorney General may be in the name of the United States *or otherwise as permitted by law.* In the actions

now before this Court, the litigation must be conducted in the name of the Price Administrator or his successor, as that is the only procedure *permitted by law*—the Emergency Price Control Act. Thus, Executive Order 9842 does not even purport to authorize the maintenance of this litigation in the name of the United States, and if it did it would, of course, be nugatory as constituting executive action in violation of statute. The Attorney General was to act as the Attorney for the Secretary of Commerce. The fact that someone in the Department of Justice may be embarrassed by the holding of the Court of Appeals in this case is no justifiable reason why the Petitioner should not have followed the rules of procedure which should be binding on both Petitioner and Respondents. We submit that the President properly acted in accordance with his statutory authority.

No construction, administrative or otherwise, can be permitted to prevail over the plain language of the Emergency Price Control Act, which requires that these actions be maintained by the Price Administrator. We are dealing in this case with an action which is created wholly by statute. Were it not for the statute no action would lie. It is therefore elementary that Petitioner instead of trying to avoid substitution of proper plaintiff, should have substituted the Secretary of Commerce as the President in his Executive Orders directed.

II.

The Emergency Price Control Act, as amended, requires that these actions be maintained by the Price Control Administrator. The United States cannot be substituted as party plaintiff.

Section 205(e) of the Emergency Price Control Act, as amended (50 App. U.S.C.A. §925(e)) creates the liability which is sought to be enforced in these proceedings. It must be conceded that, absent this statute, there would be no basis for the institution or maintenance of these suits. Under such circumstances, it is well settled that the provisions of this statute must be meticulously observed with respect to the extent of the liability and the mode of its enforcement. In *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174 (1915), this Court stated the rule as follows:

> "• • • 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' "

This language was recently quoted with approval and the rule reaffirmed in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 755 (1947).

Turning to Section 205(e) of the Emergency Price Control Act, as amended, we find that after establishing the liability of a seller to respond in a *civil* action for damages arising out of overcharges, the section provides that if the buyer fails to commence a suit "*the Administrator may institute such action on behalf of the United States.* • • • If such action is instituted *by the Administrator,* the buyer shall thereafter be barred. • • • Any action under this subsection by *either the buyer or the Administrator,* as the case may be, may be brought in any court of competent jurisdiction." (Emphasis supplied.)

The statute thus prescribes in plain and unambiguous language that the plaintiff in these actions shall be either the buyer or the Administrator. The United States, in seeking to be substituted as party plaintiff, asks this Court to override this statutory requirement.

If it was the intention of the Congress that the United States should be party plaintiff and that the Administrator under the Emergency Price Control Act is only a "figurehead", why were not all original civil proceedings involving that Act started in the name of Petitioner? It is obvious that the Department of Justice in notifying the various United States Attorneys throughout the country was guilty of not giving proper instructions as to the substitution. Petitioner now seeks to rectify the mistakes by changing the rules "in the middle of the game". It seems to the Respondents that the same rules should apply to the Government as to the ordinary citizen.

Nowhere in Petitioner's Brief is there indicated why Fleming, as Administrator of the Office of Temporary Controls, was substituted as the then Successor Administrator to Porter instead of the United States.

The Petitioner contends that it may be granted leave to maintain these actions on the theory that it is the real party in interest. This identical argument was advanced by the Government and was firmly rejected in *Bowles* v. *Wilke*, 175 F. (2d) 35 (1949) *cert. denied* 338 U. S. 861. As the Court there said, this argument begs the question in view of the language of the Emergency Price Control Act. The court stated:

> "The Government seeks to avoid the rule by insisting that it applies only to cases involving personal actions against governmental officers, and not to actions brought by such officers for the ultimate benefit of the United States; that the United States was al-

ways the 'real party in interest,' and, consequently, no substitution was required. But, in the *Fix* case, it could as truly have been said that the United States was the 'real party in interest,' in that any recovery on the bond would have inured to the benefit of the United States and not to the Collector personally. The same is true of most actions brought by an agent or arm of the United States Government. In other words, to argue that the Administrator was only a nominal plaintiff; that the United States was the real party in interest, and hence that there was no need for the Administrator's successors to comply with the rule, is to beg the question. *The fact remains that the Emergency Price Control Act provided that such actions were to be instituted and maintained by the Administrator, and the plain language of the rule calls for its application to those cases.*" (Emphasis supplied.)

Petitioner purports to cite various cases in which it indicates a conflict with the decision of the Court of Appeals in the instant action. Petitioner nowhere in its Brief cites the case of *Bowles* v. *Wilke*, 175 F. (2d) 35 which is the latest pronouncement on the question herein involved prior to the decision in the instant case. In the *Wilke* case, certiorari was denied by this Court on October 24, 1949 (338 U. S. 861). It is subsequent to the cases cited from the other circuits and it is obvious that the Court took into consideration the prior holdings. The holdings on the questions involved in this case in the so-called "conflicting" circuits were to a large extent merely incidental to the questions involved here.

The argument that the Price Administrator is simply a nominal plaintiff and that the United States is the real party in interest not only does violence to the statutory prescription of the party plaintiff in these actions, but also misconceives the interests involved. The provision

for treble damage actions was included in the Price Control Act as one of the principal price control enforcement weapons. Accordingly, the Administrator was given control over these actions so that they could be used in the exercise of his sound administrative discretion to effectuate the purposes of the Act. Similarly, Section 205(a) permits the Administrator to seek injunctions, Section 205(d) authorizes him to intervene in any suit wherein a party relies upon the Act or any requirement thereunder, and Section 205(f) authorizes him to institute a licensing system (50 App. U.S.C.A. §925(a), (d), (f)). The role of the United States is confined to the bringing of *criminal* prosecutions under Section 205(b). Even in connection with criminal prosecutions, however, Section 205(b) provides that whenever the Administrator has reason to believe that any person is liable to prosecution, he may certify the facts to the Attorney General.

Thus it is apparent that the statutory enforcement scheme is complete, integrated and specific and shows a conscious and deliberate delineation by Congress between the respective responsibilities and powers of the Administrator and the United States. In a situation such as this, where Congress has defined in a comprehensive manner the enforcement devices which it intended to permit, it is not for the judiciary or the executive to add new sanctions or to interpolate modifications. *Cf. Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. at 750-1 (1947).

It is no answer to say that at the present time the need for administrative discretion in enforcement of price control no longer exists. The fact remains that this was the reason which prompted Congress to draft the statute so that these actions could be instituted and maintained only by the Administrator. The statute cannot now be rewrit-

ten by the courts or by an executive order but must be left to Congress to change, if any changes in its clear language and meaning are to be made.

It is true that Section 205(e) provides that the Administrator shall sue "on behalf of the United States". The purpose of this requirement, however, was to make certain that the sums recovered would go into the United States treasury and would not be used by the Administrator to augment the funds appropriated to him by Congress. Congress was simply protecting its supervision over administrative action through its control over the purse strings; it was not declaring that the Administrator was an automaton with only a nominal interest in enforcement litigation. Indeed, the fact that Congress specifically provided that the Administrator shall bring these actions on behalf of the United States indicates that Congress was attentive to the very problem here under consideration and that it said exactly what it intended. Where Congress has desired to authorize the bringing of suits in the name of the United States, it has used explicit language, appropriate to its purpose. See *e. g.*, 25 U.S.C.A. §201; 31 U.S.C.A. §232; 40 U.S.C.A. §270b.

Cases in which the United States is permitted to sue upon a cause of action which could also have been enforced by a governmental agency are plainly distinguishable. In none of those cases does the governing statute limit the right to sue to a particular government official as does the Emergency Price Control Act.

III.

The order of dismissal is not appealable as Section 2105 of the Judicial Code prohibits reversal "for error in ruling upon matters in abatement".

With respect to the appealability of the orders entered by the District Court, we believe that they are clearly not subject to review under 28 U.S.C.A. §2105, as correctly applied in *Bowles* v. *Wilke,* 175 F. (2d) 35 (1949) *cert. denied* 338 U. S. 861. That decision squarely settles this point.

In the *Wilke* case at Page 38 the court said that it is clear

> "if the decision of the District Court in the case at bar was based on a matter in abatement not involving jurisdiction, the statute forbids a reversal by this court, irrespective of the correctness of the ruling."

In referring to the holding of the District Court the court said further

> "in holding that the action had abated, the court had to determine first that the provisions of Rule 25(d) applied to Bowles successor. If the court erred in its conclusion, it committed an error in ruling upon a matter of abatement which we are precluded by statute from reviewing."

The District Judge in the cases at bar likewise determined that the provisions of Rule 25(d) of the Rules of Civil Procedure applied and found as a part of his order (R. 20) that the Secretary of Commerce as the successor in office to the Temporary Controls Administrator had failed within six months after taking office to show satisfactorily to the court that there was a need for continuing and maintaining these actions and to move to be substituted in these actions.

Petitioner does not challenge the holding of the court in *Bowles* v. *Wilke,* 175 F. (2d) 35 (1949) cert. denied 338 U. S. 861, that the granting of defendants' motions to dismiss or abate was a "ruling upon matters in abatement." Section 2105 on its face would preclude reversal.

The reenactment of this provision as a part of the revised Judicial Code indicates a Congressional intent that it should continue as one of the important boundary posts delineating the field of federal appellate court functions. Especially is this true in the light of the excellence of the advisory work on this revision, so well described in *Ex parte Collett,* 337 U. S. 55, 65-71 (May 13, 1949). From the standpoint of this case, the significant changes in the provision are, *first,* a broadening of the reversal prohibition to cover the more general "matters in abatement" in lieu of "pleas in abatement," and *second,* the insertion of the word "upon" after "ruling" apparently because of the criticism of this omission in *McHie* v. *McHie,* 78 F. (2d) 351.

In the *Wilke* case the court cited with approval *Fix* v. *Philadelphia Barge Co.,* 290 U. S. 530, 533, that failure of a successor collector of internal revenue to make timely application for substitution "forecloses the particular remedy * * *; it does not destroy the right." Thus, it is apparent that any possible "harshness" in applying Section 2105 arises from a purely collateral matter, *i. e.,* the one year statute of limitations. This Congressional limitation upon the period of possible liability should not be circumvented by asking that Section 2105 and Rule 25(d) be interpreted contrary to their clear language and the previous decisions of the Supreme Court. Such statutes and rules are designed to apply independently of collateral matters, such as the possibility that there may be a valid defense to a subsequent action.

In *Fleming* v. *Mohawk Wrecking & Lumber Company,* 331 U. S. 111 this Court indicated that Rule 25(d) is applicable to an action such as this. In that case this Court said (331 U. S. at page 119, 67 S. Ct. at Page 1133):

> "For these reasons Fleming is a successor in office of Porter and may be substituted as a party under Rule 25, Rules of Civil Procedure, 28 U.S.C.A. following section 723c. The rule requires a showing of 'substantial need' for continuing and maintaining the action. Though most of the controls have been lifted, the Act is still in effect. Liabilities incurred prior to the lifting of controls are not thereby washed out. *United States* v. *Hark,* 320 U. S. 531, 536, 64 S. Ct. 359, 362; *Utah Junk Co.* v. *Porter,* 328 U. S. 39, 44, 66 S. Ct. 889, 892; *Collins* v. *Porter,* 328 U. S. 46, 49, 66 S. Ct. 893, 894."

It is clear that where a final judgment has been entered, an appeal may be taken and the reviewing court may consider any prejudicial errors which may have contributed to that judgment, provided they are not errors in "ruling upon matters in abatement." Obviously, there might be other errors. *Leitensdorfer* v. *Webb,* 20 How. (61 U. S.) 176, illustrates the distinction. There a plea in abatement on the ground that the attachment affidavit was insufficient was overruled and, after a trial on the merits, plaintiff obtained judgment. On writ of error, the Supreme Court held that section 22 of the Judiciary Act of 1789 (1 Stat. 84), from which Section 2105 is derived, prohibited reversal because of the ruling on the plea in abatement and, since the defendant failed to show error in the trial on the merits, the Supreme Court affirmed the judgment.

Wherever the provision against reversal for error in abatement rulings has been invoked, the Supreme Court has applied it. In *Stephens* v. *Monongahela Bank,* 111 U. S. 197, the Supreme Court affirmed a judgment on a ruling

in abatement on the basis of the statute, saying at page 198:

> "* * * it is expressly provided that there shall be no reversal in this court or the Circuit Court for error in ruling any plea in abatement * * *. The defence is one which merely defeats the present proceeding, and does not conclude the plaintiff forever, * * *."

In *Piquignot* v. *Pennsylvania R. R. Co.*, 16 How. (57 U. S.) 104, the defendant pleaded in abatement that another suit was pending in the state court. The trial court overruled the plaintiff's demurrer to the plea and entered judgment for the defendant, which was affirmed by the Supreme Court, which said on page 104:

> "The judgment of the court below on the plea is not subject to our revision on a writ of error."

To the same effect are *McHie* v. *McHie*, 78 F. (2d) 351, *Marinette Sawmill Co.* v. *Scofield*, 174 F. 562, *Barnsdall* v. *Waltemeyer*, 142 F. 415, and *Cunningham* v. *Rodgers*, 171 F. 835.

Fitzpatrick v. *Flanagan*, 106 U. S. 648, like several other cases, was decided without reference to the statutory predecessor of Section 2105. *Buck Stove Co.* v. *Vickers*, 226 U. S. 205 and *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, were both decided on the basis of express limitations in the language of Section 22 of the First Judiciary Act which restricted its application to a review of decisions in the federal courts and to civil cases. Neither of these decisions throw the slightest doubt on the application of Section 2105 to a civil case decided by a federal district court, as in the case at bar.

CONCLUSION.

It is the position of Respondents that there are no special circumstances in this case which furnish a reason for reviewing a judgment of the character which was entered and, further, that the decision of the Court of Appeals is clearly correct. It is submitted that the petition of certiorari should be denied.

Respectfully submitted,

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